Upper Tier Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/50882/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision Promulgated**
On 8 January 2016	**On 26 January 2016**

Before

Deputy Upper Tribunal Judge Pickup

Between

Secretary of State for the Home Department

Appellant

and

MD Zahedul Hoq
[No anonymity direction made]

Claimant

Representation:
For the claimant: Mr C Litchfield, instructed by SEB Solicitors
For the appellant: Mr S Kotas, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The claimant, MD Zahedul Hoq, date of birth 16.6.81, is a citizen of Bangladesh.

2. This is the appeal of the Secretary of State against the decision of First-tier Tribunal Judge Martins promulgated 21.7.15, dismissing on immigration grounds, but allowing on human rights grounds, his appeal against the decision of the Secretary of State, dated 4.2.15, to refuse his application for leave to remain in the UK as a Tier 4 (General) Student and to remove him from the UK pursuant to section 47 of the Immigration Asylum and Nationality Act 2006. The judge heard the appeal on 24.6.15.

3. First-tier Tribunal Judge Peart granted permission to appeal on 20.10.15.

4. Thus the matter came before me on 8.1.16 as an appeal in the Upper Tribunal.

Error of Law

5. For the reasons set out below I found such error of law in the making of the decision of the First-tier Tribunal as to require the decision of Judge Martins to be set aside and remade, which I do by dismissing the appeal.

6. The claimant's application was refused by the Secretary of State following consideration of the relevant requirements of paragraph 245ZX of the Immigration Rules. In essence, his application was doomed to failure under 245ZX(l) because his previous leave expired on 23.8.14 and the start of his course was 13.10.14, more than 28 days after the expiry of his leave.

7. The relevant background can be summarised as follows. The claimant first came to the UK as a student in 2007. He obtained a Bachelor of Science degree in 2012 and was granted further leave to remain for Post-study work, expiring 23.8.14.

8. In his application made on 22.8.14 he sought leave to remain to study for a diploma in Healthcare Management from the UK Business College, but they failed to issue him with a CAS, as he had not submitted the original bank statements they requested from him. It is said that after receiving the bank statements the college sought confirmation of an in-time application for further leave, which he was unable to provide. The precise details are rather unclear. However, he then obtained a place at an alternative college, Meridian Business School, on a course due to start on 13.10.14. They issued a CAS but, the application was refused, for the reasons stated above.

9. Judge Martins had "some sympathy" with the claimant's argument on fairness, relying on Thakur (PBS decision –common law fairness) Bangladesh [2011] UKUT 151 (IAC) and Patel (revocation of sponsor licence – fairness) India [2011] UKUT 0021 (IAC), submitting that the Secretary of State should have considered the time when the original application was made with the start date of the first course at UK Business College. However, the judge noted that the new CAS from Meridian clearly states the start date of the course as 13.10.14, even though the CAS itself is dated 18.9.14. At §22 the judge concluded that the appeal was bound to fail on immigration grounds, as the new course did not commence within 28 days of his last period of leave. There is no challenge to that part of the decision.

10. However, the judge then went on to find in §23 of the decision that the claimant had acquired private life in the UK through his studies and his time in the UK, and that the interference with that private life caused by his removal was disproportionate to the legitimate aim of maintaining effective immigration control. The judge thus allowed the appeal on human rights grounds, relying on CDS (PBS: "available" Article 8) Brazil [2010] UKUT 00305 (IAC), to suggest that removing a student in the middle of his studies could constitute a breach of his article 8 rights.

11. However, as both the grounds of application for permission to appeal and the grant of permission to appeal point out, those findings in CDS relied on by Judge Martins were in fact obiter to that case, and in Nasim and others (Article 8) [2014] UKUT

00025 (IAC), the Tribunal stated that there was no justification to extend those obiter comments so as to equate a person whose course of study has not yet ended with a person who, having finished their course, is precluded by the Rules from staying on to do something else. Whilst stating that it would be wrong to stated that an adverse immigration decision in the case of a person who is here for study or other temporary purposes can never be found to be disproportionate, it was unlikely a person would be able to show an article 8 right by coming to the UK for temporary purposes.

12. Further, in Patel & Others v SSHD [2013] UKSC 72, the Supreme Court held that article 8 is not a general dispensing power to be applied in a near-miss case and cannot provide substance to a human rights case which is otherwise lacking merit. "The opportunity for a promising student to complete his course in this country, however desirable in general terms, is not in itself a right protected under article 8."

13. In addition to the above case law, section 117B of the 2002 provides that little weight should be given to a private life developed in the UK whilst a person's immigration status has been precarious, which has been defined by subsequent case law as including a person whose continued presence in the UK depends on the grant of further leave to remain.

14. Further, it is relevant to any article 8 ECHR consideration that there are Immigration Rules covering private life claims, particularly under paragraph 276ADE. There was no argument but that the claimant could not meet those Rules and in particular nothing to suggest that there were very significant obstacles to his integration back to Bangladesh. The judge was in error in §23 to suggest that this inability to meet the Rules "merits consideration under article 8." The Tribunal is only justified in doing so where there are compelling circumstances not adequately addressed in the Rules so as render the decision to remove him unjustifiably harsh. The judge did not identify any compelling circumstances that would or could justify granting leave to remain outside the Rules on the basis of article 8 ECHR private life. Nor can I find any such compelling circumstances on the facts of this case.

15. Frankly, even if there were any compelling circumstances to justify a proportionality assessment outside the Rules, and recognising that each case must be considered on its individual merits, following the Razgar five-step approach, it is abundantly clear that there is absolutely nothing of significance in the claimant's circumstances to suggest but that the decision was anything but entirely proportionate. There was nothing procedurally unfair about the decision to refuse his application. The desire to remain to undertake further study does not of itself give rise to any human right to remain on grounds of private life. He will be able to take advantage of the educational qualifications already obtained on return to Bangladesh. If he wishes to undertake further study in the UK he is free to apply from Bangladesh.

16. In all the circumstances both the application and the appeal against the refusal were inevitably doomed to failure from the outset.

17. It follows that the reasoning and thus the decision of Judge Martins is entirely inconsistent with the prevailing case law, in error of law, and cannot stand.

Conclusions:

18. For the reasons set out above, I find that the making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision should be set aside.

I set aside the decision.

I re-make the decision in the appeal by dismissing it on both immigration and human rights grounds.

Signed
Deputy Upper Tribunal Judge Pickup

Dated

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order. Given the circumstances, I make no anonymity order.

Fee Award **Note: this is not part of the determination.**

In the light of my decision, I have considered whether to make a fee award.

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: The appeal has been dismissed and thus there can be no fee award.

Signed
Deputy Upper Tribunal Judge Pickup

Dated